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No. 06-705

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IN THE

Supreme Court of the United States

DOW CORNING CORPORATION,

Petitioner,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, MERRILL LYNCH, PIERCE, FENNER & SMITH, BANK OF AMERICA, N.A., BANK OF NEW YORK, JP MORGAN CHASE, DK ACQUISITION PARTNERS, L.P., HALCYON MANAGEMENT CO. LLP, HALCYON OFFSHORE MANAGEMENT CO., LLC, ANGELO, GORDON & CO., DAVIDSON KEMPNER INTERNATIONAL ADVISORS, M.H. DAVIDSON CO., INC., APPALOOSA MANAGEMENT, LLC, FRANKLIN MUTUAL ADVISORS, LLC, BEAR STEARNS & CO., INC., BEAR STEARNS GOVERNMENT SECURITIES, INC., BEAR STEARNS INVESTMENT PRODUCTS, INC., CUSTODIAL TRUST CO., NEWSTART FACTORS, INC., FARALLON CAPITAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS II, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS III, L.P., FARALLON CAPITAL OFFSHORE INVESTORS, INC., FARALLON CAPITAL MANAGEMENT, LLC, JP MORGAN CHASE BANK, CONSOLIDATED PRESS INTERNATIONAL, THE COMMON FUND, TINICUM PARTNERS LP, CREDIT SUISSE FIRST BOSTON MANAGEMENT CORP., AMROC INVESTMENTS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Where a solvent debtor's plan of reorganization was confirmed after being amended to overcome an objection, sustained by the Bankruptcy Court, that the plan violated Section 1129(b) of the Bankruptcy Code, whether the Bankruptcy Court must subsequently interpret the amended plan to be consistent with the confirmation order and Section 1129(b).

2. Where a class of creditors rejected the plan of reorganization of a solvent debtor that sought to impair their contractual rights, and the debtor nevertheless attempted to confirm the plan, whether attorneys' fees and other costs incurred to successfully oppose the plan in order to enforce the creditors' contractual rights may be recovered.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents on whose behalf this brief is being filed state the following:

Appaloosa Management L.P. Appaloosa Management L.P. is a Delaware limited partnership and as such does not have a parent company. Its general partner is Appaloosa Partners Inc., a Delaware corporation. Not more than 10% of either entity is held by a publicly traded company.

Bank of America, N.A. Bank of America, N.A. is 100% owned by NB Holdings, Inc., which is 100% owned by Bank of America Corporation. The securities of Bank of America Corporation are publicly traded. No publicly held company owns 10% or more of its stock.

Bear Stearns & Co., Inc. The Bear Stearns Companies, Inc. is the parent company of Bear Stearns & Co., Inc.

Bear Stearns Investment Products, Inc. (f/k/a Bear Stearns Government Securities, Inc.) Bear Stearns Government Securities, Inc. has changed its name to Bear Stearns Investment Products, Inc., and the Bear Stearns Companies, Inc. is the parent company of Bear Stearns Investment Products, Inc.

The Common Fund. The Common Fund has no parent company, and no publicly held company owns 10% or more of its stock.

Consolidated Press International. Consolidated Press International has no parent company, and no publicly held company owns 10% or more of its stock.

Credit Suisse First Boston Management LLC (f/k/a Credit Suisse First Boston Management Corporation). Credit Suisse Group is the parent company of Credit Suisse First Boston Management LLC.

Custodial Trust Co. Custodial Trust Co. has no parent company, and no publicly held company owns 10% or more of its stock.

D.K. Acquisition Partners, L.P. D.K. Acquisition Partners, L.P. has no parent company, and no publicly held company owns 10% or more of its stock.

Davidson Kempner International Advisors. Davidson Kempner International Advisors has no parent company, and no publicly held company owns 10% or more of its stock.

Farallon Capital Institutional Partners, L.P. Farallon Capital Institutional Partners, L.P. has no parent company, and no publicly held company owns 10% or more of its stock.

Farallon Capital Institutional Partners II, L.P. Farallon Capital Institutional Partners II, L.P. has no parent company, and no publicly held company owns 10% or more of its stock.

Farallon Capital Institutional Partners III, L.P. Farallon Capital Institutional Partners III, L.P. has no parent company, and no publicly held company owns 10% or more of its stock.

Farallon Capital Management, LLC. Farallon Capital Management, LLC has no parent company, and no publicly held company owns 10% or more of its stock.

Farallon Capital Offshore Investors, Inc. Farallon Capital Offshore Investors, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

Farallon Capital Partners, L.P. Farallon Capital Partners, L.P. has no parent company, and no publicly held company owns 10% or more of its stock.

Franklin Mutual Advisers, LLC. Franklin Mutual Advisers, LLC is a limited liability company, the sole member of which is Franklin/Templeton Distributors, Inc., which in turn is a wholly-owned subsidiary of Franklin Resources, Inc. Franklin Resources, Inc.'s securities are publicly traded.

Franklin Resources, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

Halcyon Asset Management, LLC. Halcyon Asset Management, LLC has no parent company, and no publicly traded company owns 10% or more of its stock.

Halcyon Offshore Asset Management, LLC. Halcyon Offshore Asset Management, LLC has no parent company, and no publicly traded company owns 10% or more of its stock.

JPMorgan Chase Bank, N.A. JPMorgan Chase & Co. is the parent company of JPMorgan Chase Bank, N.A.

M.H. Davidson Co., Inc. M.H. Davidson Co., Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

Merrill Lynch, Pierce, Fenner & Smith Incorporated. Merrill Lynch & Co., Inc. is the parent company of Merrill Lynch, Pierce, Fenner & Smith Incorporated.

Murray Capital Management, Inc. Murray Capital Management, Inc., has no parent company, and no publicly held company owns more than 10% or more of its stock.

Newstart Factors, Inc. Newstart Factors, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

Official Committee of Unsecured Creditors. The Official Committee of Unsecured Creditors is an official statutory committee appointed under the Bankruptcy Code to represent the interests of the unsecured creditors in the bankruptcy case of Dow Corning Corporation. Accordingly, the Official Committee of Unsecured Creditors has no parent company and does not issue stock.

Tinicum Partners LP. Tinicum Partners LP has no parent company, and no publicly held company owns 10% or more of its stock.

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CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN CASE

1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

* * *

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

* * *

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this

section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

* * *

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

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OFFICIAL COMMITTEE OF UNSECURED CREDITORS, MERRILL LYNCH, PIERCE, FENNER & SMITH, BANK OF AMERICA, N.A., BANK OF NEW YORK, JP MORGAN CHASE, DK ACQUISITION PARTNERS, L.P., HALCYON MANAGEMENT CO. LLP, HALCYON OFFSHORE MANAGEMENT CO., LLC, ANGELO, GORDON & CO., DAVIDSON KEMPNER INTERNATIONAL ADVISORS, M.H. DAVIDSON CO., INC., APPALOOSA MANAGEMENT, LLC, FRANKLIN MUTUAL ADVISORS, LLC, BEAR STEARNS & CO., INC., BEAR STEARNS GOVERNMENT SECURITIES, INC., BEAR STEARNS INVESTMENT PRODUCTS, INC., CUSTODIAL TRUST CO., NEWSTART FACTORS, INC., FARALLON CAPITAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS II, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS III, L.P., FARALLON CAPITAL OFFSHORE INVESTORS, INC., FARALLON CAPITAL MANAGEMENT, LLC, JP MORGAN CHASE BANK, CONSOLIDATED PRESS INTERNATIONAL, THE COMMON FUND, TINICUM PARTNERS LP, CREDIT SUISSE FIRST BOSTON MANAGEMENT CORP., AMROC INVESTMENTS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

The Court should deny the petition for a writ of *certiorari* filed by Dow Corning Corporation ("Dow Corning" or

"Petitioner"), a solvent debtor that emerged from bankruptcy years ago. Petitioner seeks interlocutory review of a decision of the Court of Appeals for the Sixth Circuit that is not in conflict with any decision of this Court or of any Court of Appeals. On the contrary, the decision is consistent with *Stoll v. Gottlieb*, 305 U.S. 165 (1938), and a long line of cases holding that a confirmation order is binding precedent.

Petitioner contends that the decision of the Court of Appeals permitted a collateral attack upon a bankruptcy confirmation order, and warns that, if left standing, the decision will fatally undermine the principle of finality that applies to such orders. Petitioner also suggests that consideration of the petition should be withheld pending this Court's resolution of another petition addressing attorneys' fees in bankruptcy cases.

The concerns expressed in the petition are unfounded. The decision below did not involve, let alone condone, a collateral attack upon a confirmation order. Rather, the ruling, and the facts upon which it was based, present the opposite circumstance. Respondent creditors (the "Class 4 creditors") rejected a proposed reorganization plan. At confirmation, they objected to the plan on the ground that the plan violated Section 1129(b) of the Bankruptcy Code. The Bankruptcy Court *sustained* that objection. With Petitioner's consent, the Court deemed the plan amended so as to conform to the requirements of Section 1129(b), and confirmed the plan as amended (the "Plan").

Two years later, the Bankruptcy Court inexplicably issued a decision interpreting the plan amendment that was completely at odds with its earlier ruling. The Class 4 creditors appealed. Their appeal was not a collateral *attack* on the Bankruptcy Court's original ruling confirming the Plan, which had sustained Class 4's objection, but an effort to *enforce* that ruling. The decision of the Sixth Circuit, holding that the Bankruptcy Court's analysis of its own prior order was required to conform to the same rule of law that

mandated the original ruling, creates no conflict among the Circuits, and certainly neither involved, nor condoned, any collateral attack.

Petitioner also contends that a split among the Circuits is raised by the holding that Class 4's contractual attorneys' fees and costs must be paid by the solvent Dow Corning, and notes that this Court has agreed to consider a case raising an attorneys' fees issue in an entirely different context. As shown below, there is no reason to delay disposition of this petition pending a decision in that case.

COUNTER-STATEMENT OF THE CASE

The petition acknowledges that Dow Corning was solvent when it proposed in its plan that shareholders retain billions of dollars in equity in the reorganized entity. But the petition fails to acknowledge that Dow Corning's solvency, and the plan of reorganization it proposed, brought into play legal principles that arise very rarely in Chapter 11. Dow Corning's solvency, and its unsuccessful efforts to confirm a reorganization plan impairing the rights of creditors who rejected the plan, differentiated this case from other bankruptcy cases, and mandated the result reached by the Court of Appeals.

1. Petitioner Was The Rare Solvent Debtor

Because Dow Corning was solvent, its creditors were entitled to receive interest on their claims. Dow Corning's proposed plan did provide for payment of "pendency interest"—interest payable for the period of the pendency of a Chapter 11 reorganization—to Class 4 creditors, but dictated that interest would be awarded only at the federal judgment rate, which was much less than the rates set by some contracts. Pet. App. at 3a. Although by then the case had already been pending for four years, the plan also failed to apply the rates applicable after the natural maturity of Class

4's contractual debt obligations. As a result, Class 4 creditors voted overwhelmingly to reject the proposed plan. *Id.* at 4a.

2. Class 4 Objections Sustained At Confirmation Hearing

Dow Corning then sought to "cram down" the plan over the dissenting vote of Class 4.[1] Class 4 creditors objected to confirmation, contending that the plan, proposed by a solvent debtor, was not "fair and equitable" within the meaning of Section 1129(b), because the plan denied Class 4 creditors the full measure of interest, including default interest, provided under their contracts. *Id.* Class 4 sought enforcement of the absolute priority rule, codified in Section 1129(b), which requires, in a solvent case, that creditors' claims, including claims for contract interest, be fully satisfied before equity holders may receive any value. *See, e.g., Case v. L.A. Lumber Prods. Co.*, 308 U.S. 106, 115-18 (1939); *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 791 F.2d 524 (7th Cir. 1986); *Debentureholders Protective Comm. of Cont'l Inv. Corp. v. Cont'l Inv. Corp.*, 679 F.2d 264 (1st Cir. 1982).

In an opinion dated December 1, 1999, the Bankruptcy Court *sustained* Class 4's objection. Pet. App. at 5a ("The court stated that it was sustaining Class 4's objections . . . .") The Court held that:

> "Where the debtor is *solvent*, the bankruptcy rule is that where there is a *contractual* provision, valid under state law, providing for interest on unpaid installments of interest, the bankruptcy court will enforce the contractual provision with respect to both instalments [sic] due before and . . . after the petition was filed." Pet.

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[1] The "cramdown" provisions of the Code permit confirmation of a plan over the objection of a class of dissenting creditors *only* if the "absolute priority" and "best interest of creditors" tests are met as to that class. 11 U.S.C.§ 1129(a), (b)(1)-(2).

App. at 5a (quoting *In re Dow Corning Corp.*, 244 B.R. 678, 695-96 (Bankr. E.D. Mich. 1999)).

At the confirmation hearing Dow Corning committed to pay "whatever we have to pay once the courts have determined" the appropriate interest rate. *Id.* at 35a. Based upon that commitment, the Bankruptcy Court deemed the Plan to have been "verbally amended to provide that pendency interest will be paid to Class 4 creditors *in accordance with the terms of the parties' contracts*," and on that basis confirmed the Plan *Id.* at 5a-6a (emphasis added).[2] Obviously, no appeal was taken by Class 4—Class 4's objection had been sustained. Nor did Dow Corning appeal, as it had acceded to the amendment of the Plan.

3. The Bankruptcy Court's 2001 Decision

Two years later, Dow Corning objected to Class 4's claims insofar as they sought default interest or other fees and costs as provided in their contracts. Pet. App. at 6a. Astonishingly, in light of the confirmation order, the Bankruptcy Court ruled that the Plan limited Class 4's recovery of pendency interest to the contractual rates in effect on the date of Dow Corning's bankruptcy petition. The new ruling took no account of

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[2] Although the Bankruptcy Court stated that "[i]n determining the applicable rate . . . no effect is to be given to contractual provisions which purport to define as a default a voluntary petition for bankruptcy relief," the Court did not carve out from "the terms of the parties' contracts" the terms providing that other events—for example, Dow Corning's failure to repay debt when it matured—would trigger a default. Since this case was commenced over eleven years ago, the natural maturities of Dow Corning's most significant debt contracts have long since passed. After those maturities were reached, payment in full was required in accordance with the terms of the contracts. Although the Plan required that payment be made "in accordance with the terms of the parties' contracts," no payments were made, and the contracts went into default, triggering the imposition of default interest—not as a matter of the bankruptcy filing itself, but due to other post-filing events.

default interest due as a consequence of maturities occurring after the filing of the chapter 11 petition, six years earlier. *Id.* at 57a-58a.

Having sustained Class 4's objection, in 1999, and having ruled that "the Plan" could be confirmed only if it were amended to provide for payment of interest in accordance with the terms of Class 4's contracts, the same Court, in 2001, ruled that "the Plan" did not require payment of interest in accordance with the terms of Class 4's contracts. The decision was inexplicable.

4. The Decision of the District Court

Class 4 appealed. *Id.* at 7a. Dow Corning moved to dismiss the appeal, arguing, *inter alia*, that it was an untimely appeal of the confirmation order. *See In re Dow Corning Corp.*, 2002 WL 551020, at *1 (E.D. Mich. Mar. 29, 2002). The District Court followed this Court's guidance on "when parties should be allowed to appeal an order entered subsequent to a court's final judgment." *Id.* at *3 ("The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.") (quoting *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952)). Applying that test, the District Court concluded that the Bankruptcy Court's ruling "changed the Confirmation Order in a material way," and thus Class 4's appeal was timely. *See id.* at *4. Dow Corning did not appeal this order.

On the merits, the District Court affirmed the Bankruptcy Court's ruling regarding the applicable interest rate. Pet. App. 34a. Class 4 creditors appealed to the Court of Appeals for the Sixth Circuit. That Court reversed on July 26, 2006. *Id.* at 1a, 32a.

5. The Decision of the Court of Appeals

The Court of Appeals for the Sixth Circuit held that the Bankruptcy Court's construction of the Plan, which caused it to violate the "fair and equitable" requirement of Section 1129(b), was an abuse of discretion.[3] Pet. App. 18a. The Court determined, as had the Bankruptcy Court in 1999, that because Class 4 had rejected the plan, the plan could not have been confirmed unless it complied with the absolute priority rule. Therefore, as Dow Corning was solvent, all contractual claims were required to be paid in full before equity holders could retain any value. *Id.* at 16a. Noting that "solvent bankruptcy estates are somewhat of a rarity," the Court held that in such cases courts generally confine themselves to "determining and enforcing whatever pre-petition rights a given creditor has against a debtor." *Id.* at 17a.

> "Based on this application of the absolute priority rule in solvent debtor cases, Class 4 argues that we should enforce their rights under the contract, including their

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[3] The Sixth Circuit ruled that the proper standard of review was abuse of discretion, because the Bankruptcy Court's second ruling interpreted, rather than modified, the Plan. Pet. App. 11a. Petitioner devotes a considerable amount of its petition to discussion of the merits of this part of the ruling, essentially arguing that, because the Sixth Circuit held that any interpretation of the Plan that was inconsistent with the legal principles that mandated the amendment of the Plan prior to confirmation would be an abuse of discretion, the Sixth Circuit was advocating collateral attack upon the confirmation order and thus creating a conflict among the Circuits. Petitioner has not sought *certiorari* on the issue, and the issue is not fairly presented within the questions for which review is sought; therefore, this argument requires no response. In any event, as noted, Petitioner's contention is not consistent with the facts in this case. It was the Bankruptcy Court's failure to conform its plan interpretation to the rule of law that mandated its earlier ruling in 1999 that the Sixth Circuit found to be an abuse of discretion. Further, Petitioner made the same arguments in the *en banc* petition. No member of the Sixth Circuit voted to rehear the case. *See* Pet. App. at 32a.

> right to interest awarded at the default rate as set forth in the terms of their contract. We agree." *Id.* at 18a.

The Court then addressed the District Court's refusal to grant attorneys' fees and costs mandated by some of the Class 4 contracts.

> "If the analogy between the rights of the undersecured creditors to recover interest and that creditors' rights to recover fees, costs and expenses is apt, then Class 4 should be able to recover fees, costs and expenses from Dow Corning, a solvent debtor." *Id.* at 23a.

The Court of Appeals stated that this outcome was consistent with the body of cases addressing contract recoveries where a debtor was solvent, *id.* at 23a-24a, and went on to consider whether the law in the Sixth Circuit places any limitation upon contractual reimbursement rights for fees and expenses. Following *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 161 (1946), the Court held that the validity and construction of a contractual claim to such fees is governed by state law. *See* Pet. App. at 27a. The Court recognized that the Ninth Circuit has held that attorneys' fees expended litigating issues solely of federal bankruptcy law are not recoverable, but found that no such limitation existed in the Sixth Circuit. *Id.* at 29a-30a. The Court remanded for consideration of the fees permitted under specific contracts and applicable state law. *Id.* at 31a.

REASONS THE PETITION SHOULD BE DENIED

A. There Is No Conflict Among the Circuits Concerning Collateral Attack on a Confirmed Plan of Reorganization

The petition asserts that the decision below dangerously undermines principles of finality in bankruptcy cases by permitting collateral attack upon a final confirmation order. But the facts demonstrate that the petition is wrong. The decision below is entirely in accord with prior law, based

upon the venerable rule of *Stoll v. Gottlieb*, 305 U.S. 165 (1938), that a final confirmation order binds everyone—the debtor, its creditors, and the court.

Unlike the cases cited by Dow Corning, in which the party bringing a true collateral attack failed to assert an objection to confirmation of a plan, in this case, Class 4 rejected the plan, objected to its confirmation, and litigated precisely the matter now at issue. The Bankruptcy Court ruled in its favor. The plan was amended to conform to the ruling, and then confirmed.

The cases cited by Dow Corning are factually opposite, though their rulings on the law support the Sixth Circuit's decision. In *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987), a creditor failed to object to a plan provision, and then asked the court, in a later proceeding, to read the plan provision out of the plan, arguing that the provision was illegal. The Fifth Circuit held that "[q]uestions of the propriety or legality of the bankruptcy court confirmation order are indeed properly addressable on direct appeal. Republic, however, is now foreclosed from that avenue of review because it chose not to pursue it." *Id.* at 1050. Similarly, in *Stratosphere Litigation L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137 (9th Cir. 2002), a creditor failed to object at confirmation to a plan provision releasing a third party. When the creditor later claimed that the release was contrary to law, the court agreed, but held that collateral attack on the plan was barred. And finally, in *In re Varat Enterprises*, 81 F.3d 1310 (4th Cir. 1996), a creditor objected to the classification of its claim in a plan of reorganization. The plan was amended to resolve this creditor's objection. After confirmation, a second creditor objected to the treatment afforded the first creditor's claim. The court ruled, "[i]n its post-confirmation objection, First Union argues that no legal basis supported [the creditor's] alleged secured status or the [creditor's] asserted equitable lien. Because First Union

could have raised the contentions in a pre-confirmation objection or at the confirmation hearing, it is barred from litigating them now." *Id.* at 1317.

Here, the plan was initially illegal, in that it violated Section 1129(b). Class 4 objected, and asserted its legal right under Section 1129(b) to payment, from a solvent debtor, in accordance with relevant contracts. Class 4's objection was *sustained.* With Dow Corning's consent, the plan was deemed amended to provide that contract interest would be paid to Class 4 "in accordance with the terms of the parties' contracts." The Plan, as confirmed, complied with the law, and all parties were bound by it. The Court of Appeal ruling simply mandates enforcement of the confirmation order, as do the cases cited by Petitioner. Class 4 creditors did not undertake, nor did the Sixth Circuit condone, a collateral attack upon the confirmation order.

Dow Corning contends that the Sixth Circuit broke new ground by ruling that a court may not interpret a bankruptcy plan so as to violate the Bankruptcy Code. *See* Pet. App. at 7. The argument is specious. Any ruling addressed to the treatment of claims was required to comply with the treatment mandated by the confirmed Plan. *See* 11 U.S.C. § 1141(a). The Plan required payment "*in accordance with the terms of the parties' contracts,*" to comply with Section 1129(b). The Bankruptcy Court's 2001 ruling held that payment need *not* be in accordance with the terms of the parties' contracts. That decision was the true collateral attack in this case, not the Sixth Circuit's decision.

B. There Is No Reason to Withhold Action Pending Review of *Travelers*

The decision below concludes that contractual attorneys' fees and costs must be paid by a solvent debtor, absent any state law bar. Dow Corning contends that this holding is in conflict with Ninth Circuit law, and notes that this Court has

agreed to review a Ninth Circuit decision regarding recovery of attorneys' fees. *See Travelers Cas. & Surety Co. of Am. v. PG&E Co.*, 167 F. App'x 593, *cert. granted*, 127 S. Ct. 377 (2006) (No. 05-1429).

The facts in the present case are materially different from the facts in the *Travelers* case. There, the debtor had not defaulted on its obligation to the creditor-petitioner, and the plan of reorganization did not impair the creditor's claim.[4] The creditor's attorneys' fees and costs were generated in litigation over matters arising during the plan confirmation process that did not bear upon either the amount, or the payment, of its claim, but rather addressed its future rights. Here, in contrast, Dow Corning had defaulted, and the Class 4 creditors' claims were impaired by the plan in a manner that was held by both the Bankruptcy Court and the Sixth Circuit to violate the law, given Dow Corning's solvency. Dow Corning then tried to force confirmation over Class 4's objections. Class 4 creditors were required to incur attorneys' fees to vindicate their state law contractual rights in the context of a plan that proposed to dishonor those rights.

In any event, the Court of Appeals' decision is interlocutory. Because the lower courts had held as a matter of law that Dow Corning was not liable for attorneys' fees, no party or court has "yet undertaken a detailed examination of the contracts at issue." Pet. App. at 30a. Thus, the Sixth Circuit remanded the case "for proper consideration of exactly what fee arrangements are permitted under relevant state laws and under each contract at issue." *Id.* In light of the remand order, Class 4 creditors respectfully suggest that there is no reason to withhold action on the petition pending *Travelers*. Experience teaches that if no action is taken on the

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[4] *See* 11 U.S.C.§ 1124. A claim is impaired unless the plan leaves unaltered the legal, equitable and contractual rights to which the claim entitles the holder.

petition until the decision in *Travelers* issues, it is highly likely that, at most, *certiorari* would the granted for the purpose of remanding for consideration in light of the decision. Respondents respectfully suggest that exactly that will occur—consideration of this issue in light of the disposition in *Travelers*—if the proceedings in the lower courts are permitted to proceed forthwith.

The confirmation of Dow Corning's plan occurred seven years ago. The years since have been spent in various courts over various issues. This case should continue to move forward, even at the present glacial pace. In view of both the "rarity" of the context of a solvent debtor, and the interlocutory nature of the decision below, denial of the petition is appropriate.

CONCLUSION

The petition for *certiorari* should be denied.

Respectfully submitted,

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